



DIPLOMATIC ASSURANCES AGAINST TORTURE - INHERENTLY WRONG, INHERENTLY UNRELIABLE

The mere fact that States need to seek diplomatic assurances against torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment) is indicative of a risk of torture. Article 3 of the Convention prohibits the refoulement where there is such a risk, i.e. “substantial grounds for believing that he [or she] would be in danger of being subjected to torture”. This briefing paper explains Amnesty International’s position on the use of diplomatic assurances. It also summarizes key case law by the Committee against Torture and other judicial mechanisms. The briefing paper supplements the joint submission by human rights NGOs, among them Amnesty International.

The cases below highlight the fact that post-return monitoring schemes cannot in themselves prevent torture or other ill-treatment. Governments have an interest in ensuring that no breach of the assurances comes to light even when a breach can be detected, and a sending government has little sway over a receiving government to investigate, let alone to effectively prevent or remedy, possible abuse.

POSITION

Amnesty International considers that through diplomatic assurances, sending governments seek to circumvent the absolute prohibition on sending a person to a place where he or she risks torture or other ill-treatment. Promises from a receiving State that it will not torture or otherwise ill-treat a person upon return cannot satisfy a State’s absolute legal obligation not to transfer a person to a place where he or she is at risk of such abuse. All States must maintain respect for the existing, legally-binding international machinery of human rights protection in general, and the Convention against Torture in particular; by using diplomatic assurances governments attempt to circumvent that machinery, and thus represent erosion – not an advance – in human rights protection and respect for their obligations under treaties such as the Convention.

Moreover, diplomatic assurances are a dangerous and unreliable mechanism. The particular dynamics of torture and other ill-treatment lead to inherent deficiencies in assurances that prevent them from effectively and reliably mitigating against such abuse. In particular, States that practice torture routinely deny it; create administrative structures to support plausible deniability; develop techniques of torture and other ill-treatment designed to avoid detection; conceal evidence of it; and fail to implement complaint mechanisms for effective redress for victims of it. Torture is usually practiced in secret, with the collusion of law enforcement and other government personnel, and often in an environment of impunity, as States, particularly where torture is widespread, routinely fail to investigate allegations of torture, bring those responsible to account or ensure reparations to victims. Those subjected to torture or other ill-treatment are also often afraid to recount their abuse to their lawyers, family members and any person attempting to conduct post-return monitoring for fear of reprisals against themselves or their families. Nothing in any post-return monitoring mechanism, no matter how rigorous, can possibly change the irreparable nature of the harm caused by torture.

System-wide monitoring cannot guarantee the humane treatment of particular individuals. In a series of cases dealing with the return of alleged national security suspects from Italy to Tunisia, the European

Court of Human Rights has highlighted the research of human rights organizations, including Amnesty International, documenting the serious torture and other ill-treatment of such detainees in Tunisia and “concluded that international reports mentioned numerous and regular cases of torture and ill-treatment meted out in Tunisia to persons suspected or found guilty of terrorism and that visits by the International Committee of the Red Cross to Tunisian prisons could not exclude the risk of subjection to treatment contrary to Article 3 [the ban on torture and ill-treatment]”.¹

Further, monitoring mechanisms that are not part of an established framework with a proven track record not only in detecting cases of abuse, but also in consistently bringing perpetrators to justice and effectively stopping further abuse, and in actually reducing the incidence of torture, cannot seriously be considered as having any significant preventive or deterrent effect. Thus, justifying the credibility and reliability of diplomatic assurances based on a “post-return monitoring” scheme fails to address the fundamental incompatibility of diplomatic assurances against torture and other ill-treatment with international human rights obligations. The above factors have led Amnesty International alongside many other international human rights organizations and independent experts² to oppose in principle and practice any reliance on diplomatic assurances against torture or other cruel, inhuman or degrading treatment or punishment where a real risk of such abuse obtains.³

The Committee against Torture itself noted with concern in its 2013 concluding observations on the United Kingdom the State’s reliance on diplomatic assurances and called “ [...] on the State party to ensure that no individual – including persons suspected of terrorism, who are expelled, returned, extradited or deported – is exposed to the danger of torture or other cruel, inhuman or degrading treatment or punishment.” It urged the State party to “refrain from seeking and relying on diplomatic assurances “where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture”. The more widespread the practice of torture or other cruel, inhuman or degrading treatment, the less likely the possibility of the real risk of such treatment being avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. Therefore, the Committee considers that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention.”⁴

The reliance on diplomatic assurances by some States have had a ‘knock on’ effect on the use of diplomatic assurances by others, including extraditions or other transfers from Russia and Ukraine to Uzbekistan, Tajikistan or Kazakhstan and from Spain, France and Italy to Kazakhstan. The seeking and relying on diplomatic assurances have become a substitute for rigorous risk analysis and the obligation to suspend any transfer where a person is at such risk.

¹ *Ben Khemais v Italy*, (Application No. 246/07), 24 February 2009, para. 64.
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=246/07%20%7C%20246/07&sessionid=49366331&skin=hudoc-en> (in French), accessed 21 March 2010.

² For further information see Amnesty International reports: *Left in the dark: The use of secret evidence in the United Kingdom*, Index: EUR 45/014/2012, 15 October 2012, available at <https://www.amnesty.org/en/documents/EUR45/014/2012/en/> and *Dangerous deals: Europe’s reliance on ‘diplomatic assurances’ against torture*, Index: EUR 01/012/2010, 12 April 2010, available at <https://www.amnesty.org/en/documents/EUR01/012/2010/en/>.

³ See further: Amnesty International, *Uzbekistan: Fast-track to torture: abductions and forcible returns from Russia to Uzbekistan*, 21 April 2016, Index number: EUR 62/3740/2016, <https://www.amnesty.org/en/documents/eur62/3740/2016/en/>

⁴ UN Doc CAT/C/GBR/CO/5, para. 18, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f5&Lang=en

CASE LAW

In *Agiza v Sweden*⁵, the Committee expressed the view that, “the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party’s territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party’s police. It follows that the State party’s expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”

In the case concerning the extradition of *Elif Pelit*, alleged to be associated with the Kurdish Worker’s Party (PKK), from Azerbaijan to Turkey in October 2006, the Azeri authorities had received diplomatic assurances from the Turkish authorities. Elif Pelit requested interim measures from the Committee against Torture but was extradited despite an order for interim measures from the Committee requesting that the Azerbaijani authorities delay her transfer until the Committee had the opportunity to review her case. Before travelling to Azerbaijan, Elif Pelit had been granted refugee status by Germany in 1998 based on her claims that she was tortured in detention in Turkey in the mid-1990s. She submitted evidence to the Committee against Torture, including from Amnesty International, indicating that most PKK-associated prisoners are held in F-type prisons in Turkey, where ill-treatment had been and continued to be a serious human rights problem. The Committee stated that „While a certain degree of post-expulsion monitoring of the complainant’s situation took place, the State party has not supplied the assurances to the Committee in order for the Committee to perform its own independent assessment of their satisfactoriness or otherwise (see its approach in *Agiza v Sweden*), nor did the State party detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that it both was, in fact and in the complainant’s perception, objective, impartial and sufficiently trustworthy. In these circumstances, and given that the State party had extradited the complainant notwithstanding that it had initially agreed to comply with the Committee’s request for interim measures, the Committee considers that the manner in which the State party handled the complainant’s case amounts to a breach of her rights under article 3 of the Convention.”⁶

In *Abichou v Germany*⁷ the Committee stated: “While taking note of the follow-up measures implemented by the State party, the Committee recalls that diplomatic assurances cannot be used as a justification for failing to apply the principle of non-refoulement as set forth in article 3 of the Convention.”⁸ It went on to conclude that “[t]he fact that diplomatic assurances were obtained was not sufficient grounds for the State party’s decision to ignore this obvious risk, especially since none of the guarantees that were provided related specifically to protection against torture or ill-treatment. The fact that Onsi Abichou was ultimately not subjected to such treatment following his extradition cannot be justifiably used to call into question or minimize, retrospectively, the existence of such a risk at the time of his extradition. The Committee concludes that the complainant has demonstrated that Onsi Abichou faced a foreseeable, real and personal risk of being subjected to torture at the time of his extradition to Tunisia. It follows that his extradition from the State party constituted a violation of article 3 of the Convention.”⁹

The European Court has repeatedly warned the Russian authorities of the dangers of relying on diplomatic assurances when assessing the risk of torture and ill-treatment to an individual upon return. In January 2015 the Court stated in the case of *Eshonkulov v Russia* that “the Prosecutor General’s

⁵ *Agiza vs. Sweden*, Communication No. 281/2005, UN Doc. CAT/C/34/D/233/2003, 24 May 2003, para. 13.4, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F34%2FD%2F233%2F2003&Lang=en

⁶ *Pelit v Azerbaijan*, Communication No. 281/2005, UN Doc. CAT/C/38/D/281/2005, 29 May 2007, para. 11. <http://www1.umn.edu/humanrts/cat/decisions/281-2005.html>, accessed 21 March 2010 or <http://juris.ohchr.org/Search/Details/99> on 24 April 2017.

⁷ *Inass Abichou vs Germany*, Communications No 430/2010, UN Doc. CAT/C/50/D/430/2010, 21 May 2013, para. 11.5, available at <http://juris.ohchr.org/Search/Details/9> on 24 April 2017.

⁸ See communication No. 444/2010, *Abdussamatov et al. v. Kazakhstan*, decision adopted on 1 June 2012, para. 13.10.

⁹ *Inass Abichou vs Germany*, para. 11.7.

unqualified reliance on the assurances provided by the Uzbek authorities was at variance with the Court's established position that in themselves these assurances are not sufficient and that the national authorities need to treat with caution the assurances given by a State where torture is endemic or persistent". The Court further underlined that "[no] evidence has been presented by the Government to demonstrate that the Prosecutor General's Office made any effort to evaluate the risks of extradition to the country where, according to reputable international sources, the use of torture is commonplace and defence rights are routinely circumvented".¹⁰

In the case of *Othman v UK*¹¹, Abu Qatada, a Jordanian national with a refugee status in the UK since 1994, had been convicted in absentia in two separate trials in 1999 and 2000 in Jordan for terrorism-related offences, and sentenced to life imprisonment and 15 years' imprisonment respectively. He appealed to the European Court of Human Rights in February 2009 after the UK's then highest court, the Appellate Committee of the House of Lords, gave the go-ahead for his deportation to Jordan based on diplomatic assurances that he will not be subject to serious human rights violations. The Court found that if the UK deported Omar Othman, also known as Abu Qatada, it would violate his right to a fair trial because any proceedings in Jordan would likely involve the use of testimony from people who had been tortured. The court also accepted as valid the UK government's argument that in some cases 'diplomatic assurances' can mitigate the risk of torture. Amnesty International criticized this decision stating that "Diplomatic assurances are no substitute for respect for the legal obligation not to send a person to a place where he is at real risk of torture".¹² The diplomatic assurances were in fact violated through the admission of statements obtained by torture Jordanian court proceedings.¹³

On 18 April 2016, the Special Immigration Appeals Commission (SIAC) ruled on a deportation case of six Algerian terrorism suspects (*W and others*). The case concerned safety on return to Algeria where the SIAC concluded that "[v]iewing the evidence as a whole we are not convinced that the improvements in conditions in Algeria are so marked or so entrenched as to obviate the need for effective verification that the authorities will adhere to the assurances given. It is not inconceivable that these Appellants, if returned to Algeria, would be subjected to ill-treatment infringing Article 3. There is a real risk of such a breach. The different means of verification of adherence advanced by the Respondent do not, taken together, amount to a robust system of verification."¹⁴ Redacted emails from the British Embassy in Algiers from 2014 revealed that "In an Algeria [*sic*] context, there was never a realistic prospect of being able to monitor the whereabouts and well-being of the DWA deportees."¹⁵

FURTHER RESEARCH MATERIALS ON DIPLOMATIC ASSURANCES

Amnesty International and Human Rights Watch Reports

Amnesty International's Submission to the Council of Europe Committee of Ministers: Garabayev V. Russian Federation (No.38411/02) Group of Cases (March 2017)
<https://www.amnesty.org/en/documents/eur62/5839/2017/en/>

Amnesty International, *Dangerous Deals: Europe's Reliance on Diplomatic Assurances against Torture* (April 2010).

¹⁰ European Court of Human Rights, *Eshonkulov v. Russia*, (Application no. 68900/13), para. 39, 15 January 2015, available at <http://hudoc.echr.coe.int/eng?i=001-150713> and *Yuldashev v. Russia*, (Application no. 1248/09), para. 85, 8 July 2010, with further references.

¹¹ *Othman v the United Kingdom* (Application no. [8139/09](http://hudoc.echr.coe.int/eng#{)), 17 January 2012, available at [http://hudoc.echr.coe.int/eng#{"itemid":\["001-108629"\]}](http://hudoc.echr.coe.int/eng#{)

¹² <https://www.amnesty.org/en/latest/news/2012/01/european-court-ruling-abu-qatada-deportation-tarnished/>

¹³ <https://www.hrw.org/news/2014/07/11/abu-qatada-trial-showed-uk/jordan-torture-treaty-worthless>

¹⁴ *BB, PP, W, U, Y AND Z (W and others) vs. Secretary of State for the Home Department*, Appeal Nos. SC/39/2005, SC/34/2005, SC/54/2005, SC/32/2005, SC/36/2005, SC/37/2005, 18 April 2016, P. 116. Available at: <http://siac.decisions.tribunals.gov.uk/Documents/W-and-Others-open-18Apr16.pdf>

¹⁵ *W and others*, para. 113.

<https://www.amnesty.org/en/documents/eur01/012/2010/en/>

Amnesty International: United Kingdom: Deportations to Algeria at all costs (February 2007)

<https://www.amnesty.org/en/documents/eur45/001/2007/en/>

Human Rights Watch, *Not the Way Forward: The UK's Dangerous Reliance on Diplomatic Assurances Against Torture* (October 2008).

<http://www.hrw.org/en/reports/2008/10/22/not-way-forward-0>

Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (April 2005).

<http://www.hrw.org/reports/2005/eca0405/> with 2007 update

Cases Involving Diplomatic Assurances against Torture (January 2007)

<http://www.hrw.org/en/node/77209/section/1>

Human Rights Watch, *Empty promises: Diplomatic Assurances No Safeguard Against Torture* (April 2004).

<http://www.hrw.org/en/node/12145/section/1>

Amnesty International, Human Rights Watch and International Commission of Jurists. "Reject Rather than Regulate: Call on Council of Europe Member States not to Establish Minimum Standards for the Use of Diplomatic Assurances in Transfers to Risk of Torture and Other ill-Treatment,"

<https://www.amnesty.org/en/documents/ior61/025/2005/en/> (December 2005)

Amicus Briefs/Expert Affidavits

Human Rights Watch and Justice, Amicus Brief in RB and U (Algeria) Cases in House of Lords: http://hrw.org/pub/2008/ct/UKdiplomatic_assurances101008.pdf

Amnesty International, et al. Amicus Brief in Sameh Khouzam case (Third Circuit): <http://www.hrw.org/en/news/2008/04/22/us-government-s-diplomatic-assurances-policy>

ECtHR judgements:

Trabelsi v Italy: <http://legallift.wordpress.com/2010/04/13/ecthr-chamber-judgment-in-trabelsi-v-italy/>

Research Reports on Guantanamo Bay Detainees Who Suffered Violations after Return

Human Rights Watch, *Ill-Fated Homecomings: A Tunisian Case Study of Guantanamo Repatriations* (September 2007):

<http://www.hrw.org/en/reports/2007/09/04/ill-fated-homecomings>

Human Rights Watch, *The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States* (March 2007):

<http://www.hrw.org/reports/2007/russia0307/>